

Sympathy for the Devil¹: How the Ohio Tort Reform Act Creates a Flawed System of Punitive Damages

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This Comment discusses the dilemmas surrounding Ohio's tort reform legislation, which limits plaintiffs to only one punitive damage award for a tort arising out of a single course of conduct. This "one-bite" provision is analyzed in terms of its restrictions on punitive damage awards, its impact on the basic goals of tort law (such as deterrence and law enforcement), and its detrimental effect on plaintiffs' constitutional rights. Noting the problems of politicization of the issue and the lack of national uniformity in awarding punitive damages, the author suggests a series of procedural and judicial safeguards that would obviate the need for legislation limiting plaintiffs' tort recoveries. The Comment concludes with a prediction that Ohio's tort reform legislation will face constitutional challenges in the future.

I. INTRODUCTION

"I pledge allegiance to the easy dollar of the United States civil court. And to the judges and juries who award megabuck settlements. One nation, run by lawyers, with unearned wealth and easy money for All! In Litigation We Trust, Amen!"²

Few topics in the law are more widely discussed and more widely misunderstood by the public than the law of torts and the doctrine of punitive damages. Anecdotal stories of plaintiffs receiving million dollar awards for spilling coffee on themselves³ or finding scratches on their new cars⁴ have

* This Comment received the Donald S. Teller Memorial Award for the student writing that contributed most significantly to the *Ohio State Law Journal*. The author would like to thank his wife, Rebecca McComb Wall, and his family for their patience, support, and encouragement. The author also extends his thanks to the following individuals, without whom this Comment would not have been possible: Paul Wolfla, Todd Dawson, Lyle Brown, Nancy Rapoport, Kathy Northern, and the editing staff of the *Ohio State Law Journal*.

¹ THE ROLLING STONES, *Sympathy for the Devil*, on BEGGARS BANQUET (Abkco Records 1968).

² Rob Korte, *Coffee, Tea, or Oops! How About a Lawsuit?*, COLUMBUS DISPATCH, Jan. 22, 1997, at 8A.

³ See *Leibeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994) (\$2.7 million punitive damage award, reduced to \$480,000 on appeal, then settled). See Elizabeth Sherowski, *Hot Coffee, Cold Cash: Making the Most of Alternative Dispute Resolution in High-Stakes Personal Injury Lawsuits*, 11 OHIO ST. J. ON DISP. RESOL. 521, 522 & n.6, 523 n.10 (1996).

⁴ See *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996) (finding a two

reinforced popular beliefs that the tort litigation system is irrational and spiraling out of control.⁵ Ultimately, these beliefs result in widespread antagonism towards punitive damage awards and in sympathy for tortfeasors.⁶ This atmosphere helps mobilize political support for interest groups desiring to "re-establish control" over the tort litigation system.⁷ Interest groups re-establish control by lobbying the legislature to pass laws which limit the scope and frequency of punitive damage awards.⁸

This circumscription is, however, diametrically opposed to the goals of tort law, which are predicated on the belief that "the people" are best protected against the harmful conduct of tortfeasors through the powers of self-protection given to them by the judicial system.⁹ The tort system assumes that placing the power to punish outrageous conduct in the hands of the people is wiser than placing that power in the hands of the tortfeasor via the tortfeasor's ability to influence the legislature. Ironically, the public disagrees.¹⁰ Not only is it strange

million dollar punitive damage award for distributor that covered scratches on new cars to be excessive).

⁵ See Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 3-4 (1990) (debunking the public perception that punitive damage awards are large in size and frequent in occurrence); see also Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1159-62, 1242-44 (1992) (same).

⁶ See Daniels & Martin, *supra* note 5, at 18-22 (describing how stories of a few unusual punitive damage awards lead people to believe the legal system is unfairly punishing defendants); Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 36-85 (1992) (demonstrating through empirical studies that punitive damages are not excessive in the products liability context); Saks, *supra* note 5, at 1159-68 (describing the impact of anecdotal evidence on common beliefs about punitive damage awards).

⁷ See Daniels & Martin, *supra* note 5, at 10-14 (illustrating how popular outrage with punitive damage awards is utilized to garner political support).

⁸ See Daniels & Martin, *supra* note 5, at 10-14 (suggesting that anecdotal evidence is generated by interest groups because it appeals to emotion and thus facilitates advantageous legislation); cf. Saks, *supra* note 5, at 1160-61 (suggesting that the persuasive power of anecdotes is used by reformers to further their agendas).

⁹ See David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1258-67, 1277-99 (1976) (discussing the doctrine and functions of punitive damages). See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2 (5th ed. 1984).

¹⁰ See Rustad, *supra* note 6, at 36-85 (comparing the most common assumptions concerning punitive damages to empirical data on the frequency and size of actual punitive damage awards); Saks, *supra* note 5, at 1163 (discussing the popularly held belief that punitive damage awards are routinely awarded in excessive amounts). Professor Saks points out the irony of a public belief that punitive damages are excessive: "How can we explain the paradox that the people who declare awards to be excessive . . . are the same people . . . who

that the people support laws which take away their power to punish those who harm them, but it is paradoxical that the same public which sets punitive damage amounts also declares them to be excessive. Yet these beliefs, largely based on misconceptions, facilitate legislation that allows tortfeasors to engage in outrageous conduct without fear of facing meaningful punishment. Unfortunately, the Ohio Tort Reform Act¹¹ (the "Act") is an example of such legislation.

Since its introduction in the Ohio House of Representatives,¹² House Bill 350 (the "Bill") has been the subject of a great deal of legal,¹³ political,¹⁴ and social¹⁵ discourse in Ohio.¹⁶ The Bill, which was signed into law October 28, 1996 by Governor George Voinovich,¹⁷ makes sweeping changes in Ohio's existing tort law¹⁸ and represents a significant victory for business entities inside and outside Ohio.¹⁹ One of the more significant provisions of the Act, Ohio Revised Code section 2315.21(D) limits both the amount of punitive damages

make those awards?" *Id.* at 1163 n.41.

¹¹ Am. Sub. H.R. 350, 121st Gen. Assembly, 1995-96 Reg. Sess. (Ohio 1996).

¹² Columbus Republican Patrick Tiberi introduced Bill 350 in the Ohio House of Representatives on May 22, 1995. *See* 1996 (No. 10) Ohio Legis. Bull. lxi (Anderson).

¹³ *See, e.g.*, Mark Tatge, *Republicans Vow Fight to Cap Jury Awards*, PLAIN DEALER (Cleveland), May 24, 1996, at B5 (discussing the positions of the Ohio Academy of Trial Lawyers and the National Federation of Independent Business concerning punitive damage caps).

¹⁴ *See, e.g., id.* (printing comments concerning punitive damage caps from Governor George Voinovich and various members of the Ohio General Assembly).

¹⁵ *See, e.g.*, Korte, *supra* note 2, at 8A ("Americans are not just sue-happy, they're lawsuit-obsessed.").

¹⁶ Discussions concerning tort reforms have also taken place within the larger federal debate. *See, e.g.*, Roger K. Lowe & Catherine Candisky, "Excessive" Punitive Damages Ruled Out, COLUMBUS DISPATCH, May 21, 1996, at 1A (commenting on reactions to punitive damage awards from the judicial, executive, and congressional branches of the federal government). While providing a fertile source of quotations, this environment has generated considerable amounts of rash and hyperbolic commentary. Given the immediate and practical implications for Ohio citizens, there is a great need for tempered discourse in an area of the law which is easily and often misunderstood.

¹⁷ *See* 1996 (No. 10) Ohio Legis. Bull. lxi (Anderson). House Bill 350 became effective January 25, 1997. *See id.*

¹⁸ Some of the Bill's more noteworthy changes include: caps on plaintiff recovery for non-economic damages; limitations on joint and several liability; a fifteen-year statute of repose for certain real property and product liability causes of action; a two-year statute of limitation for employment discrimination; a complete bar to recovery in certain comparative fault situations; limitations on market-share liability; and caps on punitive damages. *See generally* Am. Sub. H.R. 350, 121st Gen. Assembly, 1995-96 Reg. Sess. (Ohio 1996).

¹⁹ *See infra* Part III.B-C.

and the number of times that punitive damages may be recovered under Ohio law against a defendant for a single course of conduct.²⁰ This provision raises

²⁰ See OHIO REV. CODE ANN. § 2315.21(D) (Anderson Supp. 1996). Ohio Revised Code § 2315.21(D) reads in part as follows:

(1)(a) Except as otherwise provided in division (D)(3)(b) of this section, the court shall not enter judgment for punitive or exemplary damages in excess of the lesser of three times the amount of the compensatory damages awarded to the plaintiff from that defendant or one hundred thousand dollars, as determined pursuant to division (B)(2) or (3) of this section.

(b) If the defendant is a large employer, except as otherwise provided in division (D)(3)(b) of this section, the court shall not enter judgment for punitive or exemplary damages in excess of the greater of three times the amount of the compensatory damages awarded to the plaintiff from that defendant or two hundred fifty thousand dollars, as determined pursuant to division (B)(2) or (3) of this section.

....

(3)(a) In any tort action, except as provided in division (D)(3)(b) of this section, punitive or exemplary damages shall not be awarded against any defendant if that defendant files with the court a certified judgment, judgment entries, or other evidence showing that punitive or exemplary damages have already been awarded and have been collected, in any state or federal court, against that defendant based on the same act or course of conduct that is alleged to have caused the injury or loss to person or property for which the plaintiff seeks compensatory damages and that the aggregate of those previous punitive or exemplary damage awards exceeds one hundred thousand dollars or, if the defendant is a large employer, two hundred fifty thousand dollars.

(b) Notwithstanding division (D)(3)(a) of this section, punitive or exemplary damages may be awarded against a defendant in either of the following types of tort actions:

(i) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the plaintiff will offer new and substantial evidence of previously undiscovered, additional behavior as described in division (C) of this section on the part of that defendant, other than the injury or loss for which the plaintiff seeks compensatory damages. In that case the court shall make specific findings of fact in the record to support its conclusion. The court shall reduce the amount of any punitive or exemplary damages otherwise awardable pursuant to this section by the sum of the punitive or exemplary damages awards previously rendered against the defendant in any state or federal court. The court shall not inform the jury about the court's determination and action under division (D)(3)(b)(i) of this section.

(ii) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the total amount of prior punitive or exemplary damages awards was totally insufficient to punish that defendant's behavior as described

both doctrinal and constitutional concerns, but more importantly section 2315.21(D) is pragmatically ineffective and signifies disturbing policy decisions by the Ohio General Assembly.

This Comment offers a critical analysis of the limitations placed on punitive damages by the Ohio Tort Reform Act. Part II examines the functional and doctrinal goals underlying the law of torts and the doctrine of punitive damages. This Part will also consider the recent politicization of the tort litigation system and present the due process concerns frequently expressed regarding punitive damage awards in the mass tort context. Part III analyzes the practical, doctrinal, constitutional, and political dimensions of the Act. Part IV offers an alternative means of balancing the goals of tort law and the due process interests of mass tortfeasors through a system of increased procedural safeguards. Part V concludes that the Ohio Tort Reform Act will be challenged on constitutional grounds in Ohio courts.

II. GOALS OF TORT LAW

"The law of torts . . . is concerned with the allocation of losses arising out of human activities" ²¹ Simply stated, tort law seeks to strike a balance between a plaintiff's right to protection against harm and a defendant's right to freedom of action. ²² Tort law concerns itself not only with conduct that is harmful to the individual, but also with conduct that is socially harmful. ²³ The law of torts, therefore, is a means by which the people can control the conduct of civil wrongdoers adversely affecting their community. ²⁴ In the case of

in division (C) of this section and to deter that defendant and others from similar behavior in the future. In that case the court shall make specific findings of fact in the record to support its conclusion. The court shall reduce the amount of any punitive or exemplary damages otherwise awardable pursuant to this section by the sum of the punitive or exemplary damages awards previously rendered against the defendant in any state or federal court. The court shall not inform the jury about the court's determination and action under division (D)(3)(b)(ii) of this section.

OHIO REV. CODE ANN. § 2315.21(D)(1)(a)–(b), (3)(a)–(b) (Anderson Supp. 1996).

²¹ KEETON ET AL., *supra* note 9, § 1, at 6.

²² See *id.* See generally 1 STUART M. SPEISER ET AL., *THE AMERICAN LAW OF TORTS* § 1:27 (1983) (describing tort law as a means of balancing competing interests in society).

²³ See KEETON ET AL., *supra* note 9, § 1, at 7 (stating that tort law acts as a means of insuring social control over wrongdoers).

²⁴ See KEETON ET AL., *supra* note 9, § 2 (discussing the doctrinal aspects of punitive damages and tort law); 1 SPEISER ET AL., *supra* note 22, § 1:27, at 84 (portraying tort law as a means of social control over private and public institutions); Owen, *supra* note 9, at 1262–68 (discussing the doctrinal aspects of punitive damages and tort law).

particularly outrageous conduct, the law of torts allows for the imposition of punitive damages in addition to compensatory damages.²⁵

The doctrine of punitive damages is firmly rooted in the common law of the United States and can be traced back thousands of years to numerous civilizations.²⁶ Punitive damages are intended to punish a defendant for outrageous misconduct and to deter him and others similarly situated from such conduct in the future.²⁷ Forcing the defendant to pay a substantial monetary fine for her outrageous conduct also serves as a form of revenge for the plaintiff and society as a whole.²⁸ These doctrinal goals are accomplished, though, only if outrageous conduct results in consistent and meaningful punishment.²⁹

Several leading scholars also suggest that punitive damages encourage law enforcement and compensate plaintiffs for losses not ordinarily recoverable.³⁰

²⁵ See KEETON ET AL., *supra* note 9, § 2, at 9; 2 SPEISER ET AL., *supra* note 22, § 8:45, at 802.

²⁶ See, e.g., Owen, *supra* note 9, at 1262–64. Professor Owen points out that punitive damages were available “4000 years ago in the Code of Hammurabi, the earliest known legal code.” *Id.* at 1262 n.17 (citing G. DRIVER & J. MILES, *THE BABYLONIAN LAWS* 500, 500–01 (1952)). Hittite, Hebrew, Hindu, and Roman civil laws also contained provisions for damages that were punitive in nature. See *id.* Professor Owen states that the “case that first articulated . . . ‘exemplary’ damages in English law [was] *Huckle v. Money*, 2 Wils. 205 (K.B. 1763).” *Id.* at 1263 n.19. He further states that “[t]he first reported punitive damages decision in this country appears to be *Genay v. Norris*, 1 S.C. 3, 1 Bay 6 (1784), in which the plaintiff became ill after consuming a glass of wine containing a large quantity of Spanish Fly that the defendant had added as a practical joke.” *Id.* at 1263 n.20. For additional information on the historical nature of punitive damages, see James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1119–24 (1984).

²⁷ See KEETON ET AL., *supra* note 9, § 2, at 9; 1 SPEISER ET AL., *supra* note 22, § 1:32, at 108; Owen, *supra* note 9, at 1265.

²⁸ See Owen, *supra* note 9, at 1280; see also JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 309 (1931) (“That pleasure [of revenge] is a gain; it calls to mind Samson’s riddle—it is the sweet coming out of the terrible, it is honey dripping from the lion’s mouth.”); ROBERT KEETON, *VENTURING TO DO JUSTICE* 152 (1969) (positing that the plaintiff will find pleasure in the fact that the law validates vengeful feelings). In addition, “[t]he punishment of offenders . . . reinforces the confidence of the law-abider in the basic fairness of the legal system and in the utility of his personal decision to obey the law.” Owen, *supra* note 9, at 1281.

²⁹ See, e.g., WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 1.5, at 25 (2d ed. 1986) (“The magnitude of the threatened punishment is clearly a factor [in deterrence], but perhaps not as important a consideration as the probability of discovery and punishment.”); RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.11, at 142–43 (2d ed. 1977).

³⁰ See KEETON ET AL., *supra* note 9, § 2, at 9; 2 SPEISER ET AL., *supra* note 22, § 8:45, at 802; Owen, *supra* note 9, at 1287–98.

Law enforcement is encouraged because punitive damage awards provide monetary incentive for plaintiffs to bring outrageous civil wrongdoers to justice.³¹ An outrageous tortfeasor that has caused great harm to society by injuring a large number of plaintiffs may escape punitive liability if each individual plaintiff suffers minor compensatory damage. This is because the high cost of litigation makes pursuit of such claims economically unproductive. But, "the prospect of punitive damages recoveries induces injured plaintiffs to act as 'private attorneys general'"³² thus insuring that the wrongdoer is held accountable for his behavior.

Similarly, plaintiffs receiving compensation for their injuries are often not reimbursed for the cost of bringing their case to trial.³³ In this manner compensatory damages fail to return the plaintiff to the status quo ante.³⁴ Punitive damages, therefore, serve to compensate the plaintiff for expenses that would not have been incurred but for the defendant's conduct.

The doctrine of punitive damages is, however, not without its critics.³⁵ Indeed, some commentators suggest that the doctrine of punitive damages is a relic that has outlived its usefulness and should be abolished entirely.³⁶ Most criticism, though, has focused on reforming punitive damages.³⁷ The perceived need for reform is based upon the popularly held belief that punitive damages

³¹ See Owen, *supra* note 9, at 1287-88.

³² *Id.*

³³ See *id.* at 1295-99.

³⁴ See *id.* at 1297.

³⁵ See, e.g., L.S. (Bob) Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 FORUM 57 (1975) (suggesting that punitive damages be eliminated); Sales & Cole, *supra* note 26, at 1154-65 (arguing that punitive damages are no longer useful to society and should be abolished); Hugh Evander Willis, *Measure of Damages When Property Is Wrongfully Taken by a Private Individual*, 22 HARV. L. REV. 419, 420 (1909) (suggesting that punitive damages be eliminated).

³⁶ See generally James E. Duffy, Jr., *Punitive Damages: A Doctrine Which Should Be Abolished*, in DEFENSE RESEARCH INST., INC., *THE CASE AGAINST PUNITIVE DAMAGES* 8 (1969); Sales & Cole, *supra* note 26.

³⁷ See, e.g., Dennis Neil Jones et al., *Multiple Punitive Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 ALA. L. REV. 1 (1991) (expressing the need for a federal class action procedure to protect defendants from multiple and excessive awards of punitive damages); Jerry J. Phillips, *Multiple Punitive Damage Awards*, 39 VILL. L. REV. 433 (1994) (suggesting bankruptcy as a viable means of avoiding multiple punitive damage awards); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency, and Control*, 52 FORDHAM L. REV. 37 (1983) (stating as an alternative approach the use of a class action procedure to protect defendants from multiple and excessive awards of punitive damages).

are routinely awarded, and that they are awarded in large amounts.³⁸ Critics also assert that punitive damage awards are not really damages at all, but rather they are quasi-criminal sanctions assessed without the procedural safeguards granted to criminal defendants.³⁹ Public sympathy, which centers around these concerns, is most evident in the context of mass tort litigation because a defendant can face multiple awards of punitive damages for a single course of conduct.⁴⁰

³⁸ See, e.g., Daniels & Martin, *supra* note 5, at 3–4. The authors state:

Contemporary critics of punitive damages confidently claim that the doctrine has specific and demonstrable negative effects reaching crisis proportions. Four straightforward, empirical propositions underlie these claims: punitive damages are routinely awarded; they are awarded in large amounts; the frequency and size of those awards have been rapidly increasing; and these phenomena are national in scope.

Id. See also Saks, *supra* note 5, at 1149–67 (noting that the popular belief that the tort litigation system is out of control is not supported by empirical studies); Jennifer Washburn, *Bill Hogties Tort Limits*, PLAIN DEALER (Cleveland), Apr. 2, 1996, at B9 (commenting on the widely held belief that tort suits and outrageous damage awards stifle free enterprise).

³⁹ See, e.g., Seltzer, *supra* note 37, at 43. Assuming *arguendo* the validity of this argument, it begs the question why the civil justice system should provide criminal safeguards for quasi-criminal behavior. It would seem that the more appropriate action would be to create quasi-criminal safeguards. See *infra* Part IV.

⁴⁰ See Charles D. Stewart & Phillip G. Piggott, *Punitive Damages Since Pacific Mutual Life Insurance Co. v. Haslip*, 16 AM. J. TRIAL ADVOC. 693, 697 (1993). Stewart and Piggott observed that:

Jury decisions are growing at an alarming rate in the United States. The top ten jury verdicts alone exceeded \$670 million in 1991, a staggering forty-one percent increase over the total for 1990. Such figures may be appreciated by a few attorneys and the clients they represent. However, if jury awards continue to increase, corporate America will not be able to aggressively compete in today's international marketplace.

Id. See also Paul Vollman, *Lawsuits Tame Corporate Power*, CIN. ENQUIRER, May 11, 1996, at A15 (stating that news of “jackpot verdicts evoke[s] outrage against the judicial system” for irrationally punishing defendants); Kurt Waltzer, *Tort-Reform Bill Would Hurt Ordinary Ohioans*, COLUMBUS DISPATCH, Sept. 20, 1996, at A11 (commenting that although Ohioans want an end to frivolous lawsuits, the tort reform bill would injure Ohio citizens at the expense of large business).

Indeed, popular culture has become fascinated with stories of greedy plaintiffs and lawyers that sue innocent defendants. See Saks, *supra* note 5, at 1150–68 (illustrating the prevalence of anecdotal evidence and factoids that shape people's beliefs about the tort system in modern society). For a list of cases dealing with the propriety of awarding punitive damages to separate plaintiffs bringing successive claims arising out of a single course of conduct, see Andrea G. Nadel, Annotation, “*First Comer*” Doctrine of Punitive Damages, 11

The problem of exposing a defendant to multiple awards of punitive damages for a single course of conduct was first examined over thirty years ago by Judge Friendly in *Roginsky v. Richardson-Merrell, Inc.*⁴¹ Judge Friendly pointed out that a mass tortfeasor facing hundreds of lawsuits in which plaintiffs sought punitive damages for an injury caused by a single action could produce "staggering" inequities.⁴² As Judge Friendly explained, "[w]e have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill."⁴³ Naturally, commentators consider this problem in light of the perceived characteristics of tort litigation today.⁴⁴ These commentators frequently conclude that punitive damage overkill will reach unprecedented heights due to the mass tort litigation that is "sweeping the nation."⁴⁵

In addition to fears of the "severe economic impact" these "mind boggling"⁴⁶ awards will have on the economy, commentators question whether multiple awards of punitive damages violate the due process rights of defendants.⁴⁷ First, scholars state that punitive damages expose a defendant to

A.L.R. 4th 1261 (1982).

In addition, the fact that an injured plaintiff has no "right" to a punitive damage award is frequently cited as further evidence of the inequities to which defendants are exposed. *See, e.g.,* N. Todd Leishman, *Juzwin v. Amtorg Trading Corp.: Toward Due Process Limitations on Multiple Awards of Punitive Damages in Mass Tort Litigation*, 1990 UTAH L. REV. 439, 446 (stating that a plaintiff's claim to punitive damages is diminished by the fact that the plaintiff has no right to the award).

⁴¹ 378 F.2d 832 (2d Cir. 1967).

⁴² *Id.* at 839.

⁴³ *Id.*

⁴⁴ *See, e.g.,* Jones et al., *supra* note 37, at 1-2 (suggesting that a national policy considering the aggregate amount of punitive damages be adopted to protect defendants facing multiple punitive damage awards); Seltzer, *supra* note 37, at 37-42 (proposing the use of a class action procedure to protect defendants from multiple awards of punitive damages).

⁴⁵ *See* Jones et al., *supra* note 37, at 1-2 ("[T]he advent of mass tort litigation has swept the nation, creating an unprecedented phenomenon of multiple punitive damage awards assessed against a defendant for a single course of conduct.").

⁴⁶ Sales & Cole, *supra* note 26, at 1118.

⁴⁷ *See, e.g.,* Jones et al., *supra* note 37; Stewart & Piggott, *supra* note 40. In fact, these concerns are expressed by the Ohio General Assembly in the Tort Reform Act. *See* Am. Sub. H.R. 350, § 5(B)(1)(b), 121st Gen. Assembly, 1995-96 Reg. Sess. (Ohio 1996), 1996 Ohio Legis. Bull. 2046, 2110 (Anderson) (stating that multiple awards of punitive damages violate a defendant's due process rights). The Ohio General Assembly also states that multiple awards of punitive damages have resulted in violations of the Eighth Amendment's prohibitions against excessive fines. *See id.* This is, no doubt, a reaction to the Supreme Court ruling in *Alexander v. United States*, 509 U.S. 544 (1993), in which the Court held that civil awards would qualify as fines under the Eighth Amendment. *See Alexander*, 509 U.S. at

severe punishment without corresponding safeguards to insure fair treatment at trial.⁴⁸ Second, because all punishment for a single action should be finite and proportionate to the wrong committed, repeated and unpredictable punishment for a single action offends basic notions of fairness and justice to which all wrongdoers are entitled.⁴⁹

It is against this backdrop that the Ohio Tort Reform Act was enacted.

III. THE OHIO TORT REFORM ACT

A. Preemption or Protection?—A Practical Look at Giving Ohio Citizens One Bite at the Punitive Damages Apple

In amending section 2315.21(D), the Ohio General Assembly intended to protect mass tortfeasors from "excessive and occasionally multiple awards of punitive or exemplary damages that have no rational legal connection to [their] wrongful actions or omissions."⁵⁰ The General Assembly found that multiple awards of punitive damages have resulted in the excessive punishment of tortfeasors for a single course of conduct.⁵¹ Accordingly, injured plaintiffs can now recover only one punitive damage award per defendant per course of conduct under Ohio law.⁵²

558–59. However, because the constitutional objection that multiple awards of punitive damages can expose defendants to excessive fines is, in part, presupposed by the due process objection, this Comment addresses only the latter. For an interesting discussion of the Eighth Amendment and multiple awards of punitive damages for a single course of conduct, see Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101 (1995).

⁴⁸ See, e.g., Seltzer, *supra* note 37, at 43.

⁴⁹ See, e.g., Jones et al., *supra* note 37, at 3–4 ("[A]t some point the aggregate amount of multiple punitive damages becomes fundamentally unfair, in violation of the Due Process Clause.").

⁵⁰ Am. Sub. H.R. 350, § 5(B)(1)(b), 121st Gen. Assembly, 1995–96 Reg. Sess. (Ohio 1996), 1996 Ohio Legis. Bull. 2046, 2110 (Anderson).

⁵¹ See *id.*

⁵² See OHIO REV. CODE ANN. § 2315.21(D) (Anderson Supp. 1996). Allowing a single award of punitive damages against a defendant per course of conduct is commonly referred to as the "one-bite" or "first-come" doctrine. See, e.g., Nadel, *supra* note 40. It is true that the General Assembly does allow multiple awards of punitive damages for a single course of conduct up to a prescribed ceiling amount or in the event that a judge determines the prescribed ceiling amount was inadequate to deter or punish the particular tortfeasor. See OHIO REV. CODE ANN. § 2315.21(D)(3)(a), (b)(ii) (Anderson Supp. 1996). However, these divisions will have very limited application. See *infra* notes 79–92 and accompanying text. Moreover, Ohio judges may tend to use these divisions sparingly given the General Assembly's clearly stated prohibitions against multiple punitive damage awards.

Assuming arguendo the validity of the Ohio General Assembly's findings, the "one-bite" provision will accomplish its goal of protecting mass tortfeasors in only two situations. Furthermore, any protection that might be extended to defendants will be governed as much by rules of civil procedure as by Ohio's Tort Reform Act.

The first situation in which section 2315.21(D) will afford protection from multiple punitive damage awards occurs when a mass tortfeasor is subject to jurisdiction *exclusively* within the confines of Ohio. This scenario will, of course, force the plaintiff to sue the tortfeasor under Ohio law, thus implicating the Act's punitive damages limitation.⁵³ However, such an occurrence will be rare because most mass tortfeasors subject to multiple awards of punitive damages are interstate business entities subject to jurisdiction in a number of states.⁵⁴ In addition, an exclusively intrastate business is often subject to litigation outside of Ohio when it causes tortious injuries beyond Ohio's state lines.⁵⁵ These jurisdictional issues are of paramount importance because, in the absence of a deferential conflict of laws statute,⁵⁶ each of the aforementioned scenarios will result in another state's tort law controlling the controversy, thus eliminating any protections afforded to mass tortfeasors under the Act.⁵⁷

⁵³ See generally 4 STANLEY E. HARPER, JR. & MICHAEL E. SOLOMINE, ANDERSON'S OHIO CIVIL PRACTICE § 146.03 (1996) (explaining Ohio's rules governing personal jurisdiction). Parties could, of course, agree that any dispute arising between them be governed by Ohio law. In this case, the tortfeasor would not need to be subject to jurisdiction in Ohio for Ohio law to govern the dispute. Conversely, parties could agree that another state's law govern a dispute over which Ohio courts had jurisdiction, in which case the provisions of the Act would be implicated. This Comment, however, proceeds on the assumption that no such contractual agreement exists between parties.

⁵⁴ See, e.g., Nadel, *supra* note 40 (listing numerous cases involving interstate mass tortfeasors facing multiple awards of punitive damages); see also *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981) (well-known case involving interstate mass tortfeasor facing multiple awards of punitive damages), *vacated*, 693 F.2d 847 (9th Cir. 1982); *Froud v. Celotex Corp.*, 437 N.E.2d 910 (Ill. App. Ct. 1982) (same), *rev'd*, 456 N.E.2d 131 (Ill. 1983).

⁵⁵ The forum state's long-arm statute generally permits the forum state to establish personal jurisdiction over a defendant having sufficient minimum contacts with the forum state. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁵⁶ Simply stated, a conflict of laws statute allows a court to determine what law to apply to a controversy involving multistate elements. See JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* § 4.5 (2d ed. 1993). A deferential conflict of laws statute is one that adopts the law of another state with interests involved in the controversy. See *id.*

⁵⁷ See *id.* Unless other states enact legislation similar to Ohio's, it is improbable that a mass tortfeasor will find similar protections from the law of Ohio's sister states. Thus, the Ohio General Assembly's attempt to protect mass tortfeasors from multiple awards of punitive damages will be futile in controversies involving such multistate elements.

The second situation in which section 2315.21(D) will afford protection from multiple punitive damage awards occurs when the mass tortfeasor is subject to jurisdiction under the law of another state, but is able to avail itself of that state's deferential conflict of laws statute.⁵⁸ The *Restatement (Second) of Torts* reports that most states' conflict of laws statutes defer to the law of the state with the "most significant relationship" to the interest at stake in the litigation.⁵⁹ Thus, another state's conflict of laws statute might be of assistance to a defendant in those situations in which the out-of-state claim was brought by an Ohio citizen seeking punitive damages for a cause of action arising in Ohio that was the result of the conduct of an Ohio tortfeasor.⁶⁰ But, the greater the connection between the forum state and the tortious behavior, the less likely it is that the conflict of laws statute will assist the mass tortfeasor.⁶¹ Therefore, the practical result of Ohio's one-bite provision is to protect mass tortfeasors from multiple punitive damage awards when Ohio has the only significant interest at stake in the controversy.

In situations in which mass tortfeasors can be sued under the law of another state, the mass tortfeasor receives protection from Ohio's Tort Reform Act only insofar as it preempts plaintiffs' ability to recover more than one punitive damage award under Ohio law. This creates the absurd result whereby citizens of other states may collect multiple punitive damage awards against an Ohio mass tortfeasor, while Ohio citizens are relegated to one bite at the punitive

⁵⁸ See *infra* note 59 and accompanying text.

⁵⁹ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). The *Restatement* provides the following general principle:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. at 414–15. See also *id.* § 147 (same general principle for torts involving damages to property).

⁶⁰ See *id.* § 145.

⁶¹ See *id.*

damages apply.⁶² Moreover, in a situation in which, for example, citizens from ten other states are collecting multiple punitive damage awards against a single defendant, preempting the ability of Ohio citizens to recover punitive damages does little to protect mass tortfeasors from "excessive" or "multiple" punishment.⁶³

In addition, this preemption does nothing to minimize the risk that Ohio citizens will be denied ordinary compensatory damages for their injuries if a mass tortfeasor's funds are depleted through multiple awards of punitive damages collected by another state's citizens.⁶⁴ In fact, this precise problem prompted the New Jersey Supreme Court to state: "Such a cap would be ineffective unless applied uniformly [across the country]. To adopt such a cap in New Jersey would be to deprive our citizens of punitive damages without the

⁶² This assumes that each citizen brings suit under the law of her respective state. It is important to note that this assumption applies throughout this Comment. This assumption is based on the belief that the vast majority of tort cases governed by state law are initiated by that state's citizens. It is true that the Act would prevent citizens of other states from receiving multiple punitive damages under Ohio law. Conversely, the Act would allow an out-of-state citizen to receive additional punitive damage awards from a mass tortfeasor in an Ohio court, if Ohio adopted another state's tort law. Ohio's conflict of laws provision is identical to that which the *Restatement* reports. See 4 HARPER & SOLOMINE, *supra* note 53, § 148.03, at 76-77 ("The Ohio Supreme Court has now adopted the Restatement (Second) of Conflict of Laws, which essentially directs that the substantive law of the state with the most significant contacts with the dispute be applied.") (footnote omitted).

⁶³ See Phillips, *supra* note 37, at 442-43 ("If additional punitive damage awards can be imposed upon a defendant for the same course of conduct in other jurisdictions, they would defeat the one-award approach as well as unfairly disadvantage plaintiffs in the restrictive jurisdiction."); see also Seltzer, *supra* note 37, at 57 ("Legislative or judicial action on a state-by-state basis would solve the problem only if all states adopted a uniform cap system."); Jonathan Hadley Koenig, Note, *Punitive Damage "Overkill" After TXO Production Corp. v. Alliance Resources: The Need for a Congressional Solution*, 36 WM. & MARY L. REV. 751, 769 (1995) ("A national legislative solution is preferable to state efforts at reform for the simple reason that 'one state court cannot bar [its counterpart] in another [state] from awarding repetitive damages.' Not surprisingly, only a handful of states have passed legislation specifically targeted at multiple punitive damage awards.").

⁶⁴ See, e.g., *In re Johns-Manville Corp.*, 36 B.R. 743, 746 (Bankr. S.D.N.Y. 1984) (asbestos manufacturer filing chapter 11 in the face of 38 billion dollars in projected compensatory damage claims and two billion dollars in projected punitive damages), *order aff'd*, 52 B.R. 940 (Bankr. S.D.N.Y. 1985). The goal of torts is, of course, not to bankrupt a mass tortfeasor. However, in the absence of national uniformity, defendants will necessarily face such a risk. While this result is admittedly problematic, there is very little the Ohio General Assembly can do to correct it. If the mass tortfeasor is going to be subject to multiple and excessive awards in other states, and thus possible bankruptcy, Ohioans should have the same opportunities to collect remedies as citizens of those other states.

concomitant benefit of assuring the availability of compensatory damages for later plaintiffs."⁶⁵

One naturally questions the wisdom and equity of a provision, enacted by the Ohio General Assembly, which benefits other states at the expense of Ohio citizens. Indeed, placing the citizenry at such a disadvantage is cited as the primary reason elected representatives would have little incentive to enact such a law.⁶⁶ Despite these concerns, Ohioans are now faced with the rather unattractive options of foregoing subsequent punitive damage awards altogether, filing punitive damage claims under another state's law, or winning the race to the courthouse in hopes of filing the first punitive damage claim in Ohio.

B. Doctrinal Defects

The Ohio Tort Reform Act significantly undermines the primary goals of deterrence, law enforcement, and compensation underlying tort law. This Part will examine the relationship between the Act and these doctrinal goals.

1. Punishment and Deterrence

Divisions (1)(a) and (b) of section 2315.21(D) provide for various caps on the amount of available punitive damage awards a plaintiff may recover from a tortfeasor.⁶⁷ These distinctions are predicated on the tortfeasor's status.⁶⁸ Large employers⁶⁹ will be subject to a maximum punitive damage award, per course of conduct, of three times plaintiff's compensatory damages or \$250,000, whichever is greater.⁷⁰ All other defendants will be subject to a maximum of the lesser of three times plaintiff's compensatory damages or \$100,000 per course of conduct.⁷¹

While each has the potential to adequately punish and deter tortfeasors in certain situations, these divisions are also wrought with loopholes that render judges and juries unable to deal with varying factual circumstances. Indeed, the

⁶⁵ *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 478 (N.J. 1986).

⁶⁶ *See, e.g.*, 2 AMERICAN LAW INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 261 (1991) ("[T]he state that acts alone may simply provide some relief to out-of-state manufacturers at the expense of its own citizen-victims, a situation that hardly provides much law reform incentive for state legislators.").

⁶⁷ *See* OHIO REV. CODE ANN. § 2315.21(D)(1)(a)-(b) (Anderson Supp. 1996).

⁶⁸ *See id.*

⁶⁹ A large employer is defined as "an employer who employs more than twenty-five persons on a full-time permanent basis." *Id.* § 2315.21(A)(3).

⁷⁰ *See id.* § 2315.21(D)(1)(b).

⁷¹ *See id.* § 2315.21(D)(1)(a).

Act's most significant failing is that it takes away the discretionary powers of the judge and jury, which are necessary to adequately punish and deter civil wrongdoers. A few simple illustrations highlight these problems.

First, assume that a large employer commits a tort demonstrating flagrant disregard for the safety of a single plaintiff,⁷² resulting in compensatory damage liability of \$100,000. Under division (1)(b), the employer will be liable for a maximum punitive damage award of \$300,000.⁷³ Whether this punitive damage award will deter and punish the employer will depend on the employer's financial status.⁷⁴ An employer with a net worth of one million dollars will likely be punished and deterred from engaging in similar conduct in the future, whereas an employer with a net worth of 100 million dollars may not. Yet, neither division (1)(a) nor division (1)(b) gives the court the flexibility to properly adjust punitive damage awards to account for such basic considerations.⁷⁵

The only available means by which the court can attempt to rectify this situation is found in division (3)(b)(ii) of section 2315.21(D).⁷⁶ This division gives the judge the power to allow additional punitive damage awards when previous punitive awards are found to be insufficient to adequately punish and deter the tortfeasor.⁷⁷ However, this division applies only to subsequent tort actions against the same tortfeasor for the same course of conduct.⁷⁸ Because the principle of *res judicata* prevents a plaintiff from bringing a single cause of action against a defendant once its merits have been adjudicated,⁷⁹ division (3)(b)(ii) is inapposite with respect to a single tort committed against a single plaintiff. Thus, in situations such as those described in the hypothetical above,

⁷² Section 2307.801(A) allows for punitive damage awards when a defendant manufacturer or supplier demonstrates a flagrant disregard for the safety of others who may be harmed by the product involved. *See id.* § 2307.801(A).

⁷³ *See id.* § 2315.21(D)(1)(b). All other defendants, including employers with up to twenty-five employees, would incur a maximum of \$100,000 in punitive damages liability. *See id.* § 2315.21(D)(1)(a). A small business with a net worth of five million dollars could certainly afford such "punishment."

⁷⁴ It is important to note that the General Assembly allows a jury to consider the defendant's financial status when awarding punitive damages in a product liability case. *See id.* § 2307.801(B)(5). However, this division does nothing to allow the jury to increase a punitive damage award above the cap to insure that the award reflects a meaningful percentage of a defendant's income.

⁷⁵ *See id.* § 2315.21(D)(1)(a)–(b).

⁷⁶ *See id.* § 2315.21(D)(3)(b)(ii).

⁷⁷ *See id.*

⁷⁸ *See id.*

⁷⁹ *See generally* HARPER & SOLOMINE, *supra* note 53, § 183.04 (explaining that in Ohio, a judgment rendered on its merits acts as a bar to another suit on the same cause of action).

the doctrinal goals of punishment and deterrence are effectively nullified.

Even in those situations in which the defendant is a mass tortfeasor, division (3)(b)(ii) is sufficiently ambiguous to provide defendants with substantial loopholes for avoiding increased punitive damage awards altogether, and sufficiently narrow to be of minimal significance when it is applicable. Upon judicial determination that previous awards of punitive damages for a single course of conduct are insufficient to punish and deter a tortfeasor, a court may impose subsequent punitive damages, but must first subtract all previous punitive damage awards:

The court shall reduce the amount of any punitive or exemplary damages otherwise awardable pursuant to this section by the sum of the punitive or exemplary damages awards previously rendered against that defendant in any state or federal court. The court shall not inform the jury about the court's determination and action under division (D)(3)(b)(ii) of this section.⁸⁰

Significantly, division (3)(b)(ii) provides no guidance as to whether this subsequent award of punitive damages is to be determined in accord with the prescribed statutory ceiling that applies to initial punitive damage awards.⁸¹ Assuming the ceiling applies to subsequent punitive damage awards,⁸² the provision offers a very limited means of insuring the punishment and deterrence of tortfeasors.

A second example illustrates the possible limited effect of punitive damages under section 2315.21(D)(3)(b)(ii). Assume that a large employer manufactures a product that injures several plaintiffs who all file for punitive damages. If the initial plaintiff receives both compensatory damages of \$100,000 and the maximum punitive damage award of \$300,000, a court will be able to impose subsequent punitive damages on the employer only when a subsequent plaintiff incurs compensatory damages greater than \$100,000.⁸³ Considering that each injury has arisen from the same course of conduct, it is likely that the injuries

⁸⁰ OHIO REV. CODE ANN. § 2315.21(D)(3)(b)(ii) (Anderson Supp. 1996).

⁸¹ *See id.*

⁸² This assumption is predicated on the fact that there is no indication that the ceiling, which applies to all other punitive damage awards, does not apply to this particular situation. *See id.* This is an example of a potential "loophole" which well-advised defense attorneys are sure to exploit. However, if there is no ceiling on the subsequent punitive damages which may be awarded, the provision could have a very different effect on a mass tortfeasor's aggregate liability in Ohio.

⁸³ *See id.*; *see also id.* § 2315.21(D)(1)(b). Because the subsequent award of punitive damages is subtracted from the initial award of punitive damages, the subsequent plaintiff's compensatory damages must be higher than the initial plaintiff's compensatory damages in order for the subsequent punitive damage ceiling to be higher than the initial punitive damage ceiling. Only then can a subsequent punitive damage award be above zero.

will be similar in nature and cost, thus reducing the chances that subsequent punitive damages will be available.⁸⁴

Admittedly, initial plaintiffs may not receive the maximum available punitive damage award, in which case it becomes more likely that additional punitive damages could be imposed.⁸⁵ However, it is just as probable that *subsequent* plaintiffs will not receive the maximum available punitive damage award, in which case it becomes *less* likely that additional punitive damage awards could be imposed.⁸⁶ One must also consider the possibility that punitive damage awards from other states, perhaps states without ceilings on the amount of available punitive damages, will be subtracted from subsequent punitive damage awards in Ohio.⁸⁷

In light of these and other plausible circumstances, the likelihood that a tortfeasor will be exposed to additional punitive damages is greatly diminished.⁸⁸ In those instances in which the tortfeasor is exposed to additional punitive damages, the amount by which the initial award will be increased is likely to be negligible.⁸⁹

⁸⁴ See, e.g., *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 832-39 (2d Cir. 1967) (noting that numerous future plaintiffs were likely to be awarded damages similar to the initial plaintiff's damages because they had arisen out of the same course of conduct). But see Suzanne L. Oliver & Leslie Spencer, *Who Will the Monster Devour Next?*, FORBES, Feb. 18, 1991, at 75 (commenting on the wide range of injuries caused by exposure to asbestos).

⁸⁵ See OHIO REV. CODE ANN. § 2315.21(D)(3)(b)(ii) (Anderson Supp. 1996). Clearly, the lower the initial punitive damage award, the more likely it is that subsequent punitive damage awards will exceed the initial punitive damage award.

⁸⁶ See *id.* This is simply the inverse of footnote 85. The lower the subsequent punitive damage award, the less likely it is to exceed the initial punitive damages ceiling.

⁸⁷ See *id.* Given that many mass tortfeasors are interstate manufacturers, see *supra* note 54 and accompanying text, it is quite possible that punitive damage awards will exist for the same conduct in other states. Therefore, even if a subsequent punitive damage award is available, it stands to be eliminated entirely or be substantially reduced by punitive damage awards from other states. See OHIO REV. CODE ANN. § 2315.21(D)(3)(b)(i)-(ii) (Anderson Supp. 1996).

⁸⁸ These problems are only exacerbated when the tortfeasor is not a large employer. Because defendants other than large employers are liable for a maximum of \$100,000 in punitive damages, see *supra* note 73 and accompanying text, the chances of additional recovery become slim indeed. That is, the lower the ceiling on initial punitive damage awards, the less likely it is that subsequent punitive damages will be available.

⁸⁹ See *supra* note 87 and accompanying text. One can envision a scenario in which the initial award of punitive damages is low regardless of compensatory damages. This situation might allow for a subsequently high award of punitive damages that significantly increases the tortfeasor's liability. For example, assume an initial plaintiff receives a compensatory damage award of \$100,000 and a punitive damage award of \$10,000. Upon judicial determination that this amount was insufficient to punish and deter the tortfeasor, a subsequent plaintiff with

Clearly, the possible factual scenarios and corresponding results are endless. These illustrations are simply intended to demonstrate the dangers of fixing boundaries in this particular area of the law. Without the power to assess the particular facts of each case and fashion an appropriate solution, the ability of the legal system to punish and deter mass tortfeasors is severely crippled. Moreover, the imposition of additional punitive damages has become dependent upon the fortuitous timing of a few changing variables that often have no relation to society's outrage at the tortfeasor's conduct.⁹⁰ This undermines the fundamental principle that tort law, and punitive damages in particular, is the means by which the people control the behavior of civil wrongdoers.⁹¹ Ironically, the discretion to exercise this control over local wrongdoers is now contingent upon the existence of punitive damage awards in other states, thus creating the anomalous situation in which the people of Texas, for example, determine whether the people of Ohio can punish a wrongdoer for civil wrongs committed in Ohio.⁹² Unfortunately, the voices of Ohio citizens have been drowned out by the sounds of irrational legislative line drawing.⁹³

2. Law Enforcement and Compensation

Division (3)(b)(i) of section 2315.21(D) also allows for the recovery of subsequent punitive damage awards from a tortfeasor for a single course of conduct when a subsequent plaintiff can show "new and substantial evidence of previously undiscovered, additional [punishable] behavior."⁹⁴ As in division

compensatory damages of \$100,000 could recover up to \$290,000, in the absence of punitive damage awards from other states. *See generally* OHIO REV. CODE ANN. § 2315.21(D) (Anderson Supp. 1996).

⁹⁰ *See supra* notes 22–24 and accompanying text.

⁹¹ *See supra* note 23 and accompanying text.

⁹² *See supra* note 62 and accompanying text. *See also* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 840 (2d Cir. 1967) ("[W]e think it somewhat unrealistic to expect a judge, say in New Mexico, to tell a jury that their fellow townsmen should get very little by way of punitive damages because Toole in California and Roginsky and Mrs. Ostowicz in New York had stripped that cupboard bare.").

⁹³ One also wonders about the wisdom of not informing the jury that subsequent damage awards will be reduced by previous punitive damage awards. *See* OHIO REV. CODE ANN. § 2315.21(D)(3)(b)(i)–(ii) (Anderson Supp. 1996). While this provision was obviously intended to protect the defendant from juries "piling on" punitive damages, it also serves to undermine the retributive nature of punitive damages. *See supra* notes 27–28 and accompanying text. The jury will only be able to "stick it to a defendant" symbolically because in reality the award will be significantly reduced. *See supra* notes 85–86 and accompanying text. Thus, the defendant escapes the full wrath of society's outrage at the defendant's behavior, while the jury is left believing it has punished a tortfeasor accordingly.

⁹⁴ *See* OHIO REV. CODE ANN. § 2315.21(D)(3)(b)(i) (Anderson Supp. 1996). This is no

(3)(b)(ii), any resulting punitive damage award to which the plaintiff might be entitled is reduced by the sum of all previous punitive damage awards paid by the defendant in any jurisdiction.⁹⁵

Because the construction of this division makes it improbable that substantial additional punitive damages will be awarded,⁹⁶ division (3)(b)(i) has the secondary effect of discouraging certain plaintiffs from filing subsequent claims for punitive damages against tortfeasors for previously undiscovered outrageous behavior. Because plaintiffs have little chance of receiving a substantial subsequent punitive damage award, plaintiffs will have little incentive to pay the attorney fees associated with pursuing such a claim.⁹⁷ Moreover, plaintiffs who cannot afford attorney fees will be less likely to find an attorney willing to pursue their punitive damage claim on a contingency basis. This division, therefore, has the unsalutary effect of discouraging plaintiffs from enforcing the law against outrageous tortfeasors because pursuit of these claims is economically unproductive.

Similarly, that aspect of punitive damages which compensates plaintiffs for expenses not ordinarily recoverable will be undermined as punitive damage awards are reduced or eliminated.⁹⁸ Plaintiffs will not truly be made whole, in the sense that they will not have the satisfaction of exacting retribution from an outrageous tortfeasor responsible for harming them, nor will plaintiffs be able to defray the cost of legal expenses, which are not included in the Act's compensatory damage awards.⁹⁹ Thus, division (3)(b)(i) insures that certain injured plaintiffs will not be put in as good a position upon receiving compensation as they were before suffering the tortious injury.

C. Constitutional Considerations

The Ohio General Assembly defends the limitations it has placed on punitive damage awards on several constitutional grounds.¹⁰⁰ Section 5(B)(1)(b)

doubt a reaction to *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990), in which the court held a Georgia one-bite provision unconstitutional, in part, for failure to allow punitive damage awards for undiscovered harm caused by a mass tortfeasor. *See infra* note 113.

⁹⁵ See OHIO REV. CODE ANN. § 2315.21(D)(3)(b)(i)-(ii) (Anderson Supp. 1996).

⁹⁶ See *supra* notes 80-89 and accompanying text.

⁹⁷ See *supra* note 31 and accompanying text.

⁹⁸ See *supra* notes 33-34 and accompanying text.

⁹⁹ See OHIO REV. CODE ANN. § 2323.54(A)(1)-(2) (Anderson Supp. 1996) (defining the scope of available compensatory remedies as economic and non-economic damages, neither of which includes the costs of litigation).

¹⁰⁰ See Am. Sub. H.R. 350, § 5(B)(1)(b), 121st Gen. Assembly, 1995-96 Reg. Sess. (Ohio 1996), 1996 Ohio Legis. Bull. 2046, 2110 (Anderson).

of the Act states that punitive damage awards have violated the due process rights of tortfeasors:

[Punitive damage awards have resulted] in violations of the prohibitions against cruel and unusual punishment of Section 9 of Article I of the Ohio Constitution and the Eighth Amendment to the Constitution of the United States, and in a denial of due process of law guaranteed by Section 16 of Article I of the Ohio Constitution and Section 1 of the Fourteenth Amendment to the Constitution of the United States.¹⁰¹

However, in the wake of its attempt to protect the constitutional rights of mass tortfeasors, the Ohio General Assembly may have trammled upon the constitutional rights of those citizens injured by the tortfeasor's conduct. In particular, limiting the number of punitive damage awards plaintiffs can collect may violate the Equal Protection Clauses of the United States and Ohio Constitutions.¹⁰²

In 1987, the Georgia General Assembly promulgated the Georgia Tort Reform Act, which contains several provisions similar in nature to provisions in the Ohio Tort Reform Act.¹⁰³ The Georgia Act also contains a one-bite provision, which states in pertinent part that "[o]nly one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action which may arise from such act or omission."¹⁰⁴

In 1990, this provision came under constitutional attack in *McBride v. General Motors Corp.*¹⁰⁵ In this case, McBride brought suit in a federal district court in Georgia seeking punitive damages for injuries caused by defective seatbelts manufactured by GM.¹⁰⁶ Because GM had already paid an initial punitive damage award for this defect, the Act prevented McBride from collecting a subsequent punitive damage award; thus, McBride challenged the one-bite provision on equal protection grounds.¹⁰⁷ Interpreting both the federal and state constitutions, the court found the one-bite provision to be unconstitutional.¹⁰⁸

¹⁰¹ *Id.*

¹⁰² See U.S. CONST. amend. XIV, § 1; OHIO CONST. art. I, § 2. This Comment will address only the Equal Protection Clause of the Ohio Constitution as understood through Ohio case law.

¹⁰³ See GA. CODE ANN. § 51-12-5.1(e) (1990).

¹⁰⁴ *Id.* at § 51-12-5.1(e)(1).

¹⁰⁵ 737 F. Supp. 1563 (M.D. Ga. 1990).

¹⁰⁶ See *id.* at 1565-66.

¹⁰⁷ See *id.* at 1566. McBride also challenged the statute on due process grounds; however, that claim was irrelevant to the one-bite provision. See *id.*

¹⁰⁸ See *id.* at 1576.

The court began by recognizing that the provision “on its face discriminates between plaintiffs having claims for punitive damages arising out of product liability actions, inasmuch as [the] provision would limit an award of punitive damages in product liability actions to the first plaintiff able to win the race to the courthouse.”¹⁰⁹ Because the provision was not directed towards a fundamental right or a suspect class, the court applied minimal constitutional scrutiny.¹¹⁰ Under this test the court examined whether enacting the one-bite provision was rationally related to accomplishing the General Assembly’s goals of punishing and deterring wrongdoers and facilitating business operations in Georgia.¹¹¹

The court believed that a single punitive damage award, which would bar all subsequent punitive awards, would be insufficient to adequately punish and deter certain mass tortfeasors.¹¹² The primary concern of the court was that the provision failed to establish a meaningful and substantial award, commensurate with the wrongdoing committed by a product manufacturer.¹¹³ Similarly, the General Assembly’s goal of facilitating business operations in Georgia was also rejected.¹¹⁴ The court found that the one-bite provision was so weighted in favor of business interests that it was an irrational attempt at balancing the

¹⁰⁹ *Id.* at 1569. The court also addressed the issue of discrimination between plaintiffs bringing product liability actions and plaintiffs bringing all other tort actions because only the former was subject to the one-bite provision. *See id.* The Ohio General Assembly, undoubtedly aware of this case, made no such distinction between particular actions in tort. *See* OHIO REV. CODE ANN. § 2315.21 (Anderson Supp. 1996). That is, under the Ohio Tort Reform Act all tort actions are subject to the one-bite provision. *See id.* However, the argument might be made that discrimination exists between actions in tort and other substantive areas of the law allowing for punitive damages. For example, a single contract violation by a large general contractor might result in punitive damage claims by numerous subcontractors. *See id.* § 2315.21(A)(1) (exempting civil action for damages for (1) breach of contract and (2) agreements between persons). Presumably, each subcontractor could collect punitive damages for a single course of conduct arising under Ohio contract law, whereas a corresponding remedy in tort no longer exists.

¹¹⁰ *See McBride*, 378 F. Supp. at 1576.

¹¹¹ *See id.*

¹¹² *See id.* at 1570.

¹¹³ *See id.* The court noted that an initial punitive damage award as low as \$50 would preclude all subsequent awards of punitive damages for the same course of conduct. *See id.* The court was concerned with this situation because in many mass tort cases the full extent of the wrongdoing is not known for some time after the initial punitive damage award. *See id.* The court reasoned, therefore, that punitive damages could not be properly calculated to accomplish the goals of punishment and deterrence without knowing the full extent of the wrongdoing. *See id.*

¹¹⁴ *See id.* at 1569–70.

interests of Georgia citizens and business entities.¹¹⁵ Accordingly, the one-bite provision was struck down as unconstitutional because it failed to rationally achieve legitimate state interests.¹¹⁶

Three years later, however, the Supreme Court of Georgia upheld this provision as constitutional in *Mack Truck v. Conkle*.¹¹⁷ This time the court rejected the claim that the one-bite provision violated equal protection guarantees.¹¹⁸ Significantly, the court found that the provision did not discriminate against similarly situated plaintiffs.¹¹⁹ Rather the court stated, without explanation, that plaintiffs with product liability claims were situated differently than plaintiffs with claims arising in other areas of tort law.¹²⁰ The court never addressed whether allowing an initial plaintiff to recover punitive damages for a product liability claim was discriminatory when subsequent plaintiffs, also with product liability claims, were denied punitive damages.¹²¹ However, it is implicit in the court's opinion that such treatment was not considered to be discriminatory.¹²² Moreover, the court believed the provision to be rationally related to achieving the Georgia General Assembly's goals of punishing and deterring tortfeasors.¹²³

Despite the fact that these cases reach exactly opposite conclusions, they do present a suitable framework in which to analyze the constitutional validity of Ohio's one-bite provision. Just as in the Georgia cases, the threshold inquiry under Ohio law for mounting an equal protection attack on legislation requires a plaintiff to "demonstrate either that there was no rational basis for the creation

¹¹⁵ See *id.* at 1577. This is a curious result, brought about by judicial sleight-of-hand. The Act stated that its goal was to "facilitate business." *Id.* While the Act never advanced a goal of balancing various interests, counsel for the state argued that the provision was fair legislation that "balanced the interests of [Georgia's] citizens." *Id.* The judge turned this statement into an implied goal of the Act and found the one-bite provision to be an irrational means of achieving this end. See *id.* Clearly, the judge faced a much more difficult task when confronted with the legislature's goal of facilitating business, which the provision certainly accomplished. This part of the decision seems to be motivated more by policy than logic.

¹¹⁶ See *id.* at 1578.

¹¹⁷ 436 S.E.2d 635 (Ga. 1993).

¹¹⁸ See *id.* at 639.

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ See *id.*

¹²² See *id.* It is implicit in the court's opinion that the Georgia one-bite provision was not facially discriminatory because the court upheld the provision as constitutional. Presumably, if the provision were facially discriminatory, the court would have addressed this issue.

¹²³ See *id.* ("[The provision] effectuates these purposes by providing no ceiling on the amount of punitive damages which may be awarded. However, this punishment is limited by the fact that there may be only one such punishment meted out to a products liability defendant.") (emphasis omitted).

of the class itself or that those within the class are not being treated equally in the furtherance of a legitimate governmental interest.”¹²⁴ Given the fact that the provision forces plaintiffs with exactly the same injury from the same tortfeasor to collect different remedies, Ohio’s one-bite statute is discriminatory on its face. Accordingly, Ohio courts will have to decide whether “there exists any conceivable set of facts under which the classification rationally further[s] a legitimate legislative objective.”¹²⁵ At first blush, this highly deferential language seems very difficult to overcome. However, the Ohio Supreme Court has established that such an inquiry is not merely illusory.¹²⁶

For example, in *Schwan v. Riverside Methodist Hospital*, the Ohio Supreme Court applied an equal protection analysis to a statute of limitations that established a one-year period in which to pursue an action filed against a hospital for malpractice.¹²⁷ The statute also provided that no plaintiffs, except children under the age of ten, could file an action more than four years after the act or omission occurred.¹²⁸ Children fitting the exception had until their fourteenth birthday to file.¹²⁹ The court examined the relationship between the statute of limitations and the General Assembly’s stated goal of insuring the continuance of health care delivery to Ohio citizens in the face of a “medical malpractice crisis.”¹³⁰ The court found no rational relation between the General Assembly’s goals and the statutory provision:

The statute creates a distinction—without reasonable grounds—between medical malpractice litigants who are younger than ten years of age and those who are older than ten but still minors. For example. . . a child whose cause of action accrues on the day before his tenth birthday may file an action any time until his fourteenth birthday. Yet, if the same cause of action accrued on the day *after* the child’s tenth birthday, the one year (plus notice) provision . . . apparently controls.¹³¹

Accordingly, the court struck down the provision as an unconstitutional violation of the equal protection guarantees of minors over ten.¹³²

Just as the statute of limitations in *Schwan* was found to have no rational

¹²⁴ *Morris v. Savoy*, 576 N.E.2d 765, 771 (Ohio 1991).

¹²⁵ *Schwan v. Riverside Methodist Hosp.*, 452 N.E.2d 1337, 1338 (Ohio 1983).

¹²⁶ *See, e.g., id.* (striking down legislation for having no rational relation to its stated objective).

¹²⁷ *See id.*

¹²⁸ *See id.*

¹²⁹ *See id.* at 1339–40.

¹³⁰ *Id.* at 1339.

¹³¹ *Id.*

¹³² *See id.* at 1340.

relation to its goal of preventing a medical malpractice crisis, the one-bite provision may be found to have no rational relation to its goals. The strongest and most obvious argument that the one-bite provision does not rationally further its stated objectives is that the provision will rarely protect mass tortfeasors from "excessive" or "multiple" punishment.¹³³ While the provision may reduce the aggregate number of punitive damage awards mass tortfeasors will incur, most mass tortfeasors will still be subject to "multiple" and "excessive" punitive damage awards under the law of other states. Thus, whatever protection a mass tortfeasor may enjoy will be at the expense of Ohio citizens.¹³⁴ Indeed, turning Ohio citizens into the "sacrificial lamb" of the nation provides a reviewing court with little incentive to uphold the provision as a rational means of achieving its end.

Similarly, Ohio courts should question whether placing a ceiling on the one-bite provision rationally furthers the General Assembly's goal of punishing and deterring certain tortfeasors.¹³⁵ Having once paid a punitive damage award amounting to a small percentage of its income, a well-advised mass tortfeasor, able to calculate the cost of future compensatory damages, might be encouraged to continue engaging in outrageous conduct that proved to be economically beneficial.¹³⁶ Such a tortfeasor has little to fear from a legal system with limited ability to impose meaningful subsequent awards of punitive damages.¹³⁷ In fact, an interstate mass tortfeasor that has incurred large punitive damage costs in states other than Ohio would have strong financial *incentive* to engage in economically beneficial punitive behavior within the safety of the legal confines established in Ohio.¹³⁸ These concerns illustrate why the one-bite provision may live a rather short constitutional life.

¹³³ See *supra* Part III.A.

¹³⁴ See *supra* notes 60–65 and accompanying text.

¹³⁵ See *supra* Part III.B.1.

¹³⁶ See *Funk v. Kerbaugh*, 70 A. 953, 954 (Pa. 1908) (allowing punitive damages when defendant conducted blasting operations in a manner likely to shatter plaintiff's buildings "because it was cheaper to pay damages . . . than to do the work the usual way."); Owen, *supra* note 9, at 1291 ("[A]bsent the punitive damage[] remedy, many manufacturers may be tempted to maximize profits by marketing products known to be defective and to absorb resulting injury claims as a cost of doing business.").

¹³⁷ See *supra* Part III.B.1.

¹³⁸ See *supra* notes 60–65 and accompanying text. This is because a rational tortfeasor would want to do business in the state that inflicted the least punishment upon it for outrageous conduct.

D. Legislating in the Dark, Sympathy for the Devil, and the Lack of National Uniformity

The most disturbing aspect of Ohio's one-bite provision is that it protects the interests of business at the expense of injured plaintiffs without demonstrating the need for such drastic measures. The General Assembly offers no empirical evidence to support its conclusion that punitive damage awards are subjecting tortfeasors to excessive punishment.¹³⁹ In fact, the few empirical studies conducted by impartial parties demonstrate that punitive damages are neither frequent nor exceedingly large.¹⁴⁰ Unfortunately, the politicization of

¹³⁹ See Am. Sub. H.R. 350, § 5(B)(1)(b), 121st Gen. Assembly, 1995-96 Reg. Sess. (Ohio 1996), 1996 Ohio Legis. Bull. 2046, 2110 (Anderson).

¹⁴⁰ See Daniels & Martin, *supra* note 5. The authors state the following with respect to the frequency of punitive damage awards:

Of the 25,627 civil jury verdicts in the data base for the 1981-85 period, 1,287 or 4.9% of the cases include punitive awards. This represents 8.8% of the 14,462 cases in which plaintiffs were successful. The number of punitive damage awards in all but the largest population centers is below fifty for this five year time period. Only seven sites experienced more than fifty punitive damage awards

Id. at 31. The authors go on to conclude that, "[c]ontrary to the rhetoric of the [tort] reformers, punitive damages were not routinely awarded during the early 1980's in the sites we examined. At its highest level, the punitive damage rate never exceeded one-quarter of all successful cases or one-fifth of all cases." *Id.* at 33.

The authors state the following with respect to the size of punitive damages:

[T]he typical jury award overall is also rather modest in most sites. In twelve of the twenty jurisdictions, the median for money damage cases generally is less than \$25,000, hardly an amount to support the reformers' rhetoric concerning [the] rapidly increasing award sizes. Only the five California sites and New York County have overall medians in excess of \$50,000. . . .

. . . .

The results of this study are surprising considering the reformers' rhetoric concerning punitive damages. In the sites studied, punitive damages were not routinely awarded. Nor were punitive damages typically given in amounts that "boggle the mind." Juries awarded punitive damages infrequently, and when they were awarded, the amount was generally modest.

Id. at 42-43. See also Rustad, *supra* note 6, at 36-85 (charting product liability cases in

punitive damages has resulted in the proliferation of anecdotal evidence, which fails to inform us about the true behavior of the tort litigation system.¹⁴¹

which punitive damages were awarded from 1965 to 1990 and concluding that punitive damages have been modest in size and have, in fact, decreased in frequency since the 1980s); Saks, *supra* note 5, at 1259-60.

Saks, building on Rustad's study, states:

The most intensive examination of punitive damages in product liability cases has recently been completed by Rustad. After conducting an exhaustive search of many sources, he located . . . 355 such awards in the quarter of a century between 1965-1990. . . .

First of all, a total of 355 punitive damage awards in product liability cases is not enormous, considering that each year there are about 21,900 deaths and thirty million injuries in the United States associated with the use of products. . . . In view of the base rate of injuries and the number of filings, the number of punitive damage awards seems comparatively modest.

. . . .

The median award sizes from the Rustad study [indicate] . . . that these awards are not typically in the multi-million dollar range. Second, punitives are not many times the amount of compensatory damages. At the trial level, the ratio is only about 1.2:1 and in more than one-third of the cases, the compensatory damages are actually larger than the punitives. After adjusting for inflation, no increase in the frequency of large punitive damage awards over time is evident. Thus, contrary to popular belief, punitive damage awards are not "skyrocketing."

Saks, *supra* note 5, at 1259-60 (footnotes omitted); *see also* Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64, 109 (D.S.C. 1979) ("Twelve years have now passed, and many of the fears expressed by Judge Friendly have simply not been realized. . . . This court is unconvinced that the 'specter of overkill' is anything more than just that—an unrealized phantom or mental image."), *aff'd*, 644 F.2d 877 (4th Cir. 1981). *But see* Stewart & Piggott, *supra* note 40, at 697 (stating that punitive damage awards are frequent, dangerously large, and growing at an alarming rate).

This Comment does not intimate that mass tortfeasors are never exposed to multiple awards of punitive damages. Rather, the point is simply to suggest that sympathy for such defendants should be put into a realistic perspective and considered in light of the goals of tort law. The degree to which the legislature should impede collection of punitive damages ought to reflect the actual dangers posed to most mass tortfeasors and ought to refrain from dismantling the law of torts. Legislative measures as drastic as those reflected in the one-bite provision would perhaps be warranted if multiple and excessive punitive damage awards were a chronic problem. However, reliable studies suggest that they are not. *See* Daniels & Martin, *supra* note 5; Rustad, *supra* note 6, at 36-85; Saks, *supra* note 5. Therefore, a more balanced legislative solution to the problem would seem to be in order.

¹⁴¹ *See* Saks, *supra* note 5, at 1159-60.

Instead, these "captivating little stories" of plaintiff greed and attorneys who abuse the system arouse people's emotions and garner political support for particular interest groups.¹⁴²

While politicization is an effective means of winning political battles, it turns debates concerning punitive damages into matters of "public relations, propaganda, and the mobilization of prejudice and fear, rather than rational discourse."¹⁴³ "Under such circumstances, lawmakers are forced to choose among failing to make needed reforms, making changes on little more than widely shared assumptions, or making compromises between widely divergent assertions. [This] legislating in the dark is unlikely to produce constructive solutions."¹⁴⁴

Legislation like the Ohio Tort Reform Act is the unfortunate result. Despite the lack of credible evidence that punitive damage awards are excessive, the Ohio General Assembly chose to severely limit the ability of injured plaintiffs to receive punitive damages, thus signifying a significant political victory for Ohio businesses.

Moreover, the assumption that a defendant should be protected from multiple awards of punitive damages resulting from his outrageous behavior has

¹⁴² Saks, *supra* note 5, at 1160-61; see also Daniels & Martin, *supra* note 5, at 9-14. Daniels and Martin offer an explanation as to how and why punitive damages have been politicized. They state that "politicization" is "a way of defining an issue as requiring immediate public attention in the furtherance of a particular set of political goals. 'Politicization is [therefore] the creation of meaning,'" *Id.* at 10 (citing MURRAY EDELMAN, *POLITICAL LANGUAGE: WORDS THAT SUCCEED AND POLICIES THAT FAIL* 120 (1977) (emphasis omitted)). The authors further state that "'the striking characteristics of the link between political problems and solutions in everyday life is that [in the process of politicization] the solution typically comes first Those who favor a particular course of government action are likely to cast about for a widely feared problem to which to attach [this solution] in order to maximize its support.'" *Id.* (citing MURRAY EDELMAN, *CONSTRUCTING THE POLITICAL SPECTACLE* 21-22 (1988)). To this end, Daniels and Martin contend that in the 1980s certain interest groups undertook "an intense, well-organized, and well-financed political campaign . . . seeking fundamental reforms in the civil justice system" that would benefit themselves. *Id.* These interest groups attempted to cultivate a state of mind that would characterize the civil justice system as out of control and creating crisis for American business. See *id.* at 10-11. Of course, popular belief in such statements tends to mobilize political support for legal reform. See *id.* at 11-12. Popular support for tort reform, therefore, creates the unusual situation in which the population desires that its power to control civil wrongdoers be taken away because it believes itself to be incapable of exercising control. Perhaps if more people understood the goals of tort law, and were less persuaded by anecdotal evidence, this popular support would diminish.

¹⁴³ Daniels & Martin, *supra* note 5, at 13.

¹⁴⁴ Saks, *supra* note 5, at 1153.

a somewhat dubious predicate. The concern was best expressed by an Illinois court, which failed to see why defendants should be "relieved of liability merely because, through outrageous misconduct, they have managed to seriously injure a large number of persons."¹⁴⁵ Admittedly, this oversimplifies the problem by ignoring the fact that defendants should be subject to a finite amount of punishment for a single wrongful act. However, it illustrates the point that the tortfeasor, rather than the public, should bear the burden of the tortfeasor's mistakes. Furthermore, while punitive damages may need to be limited, they should still be meaningful.¹⁴⁶ Unfortunately, Ohio's one-bite provision is unduly weighted towards protecting mass tortfeasors.

Finally, the Ohio General Assembly's efforts at protecting mass tortfeasors from multiple punitive damage awards are misguided because national uniformity is lacking.¹⁴⁷ As a result, the Act will prevent Ohio citizens from receiving the same remedies available to citizens of most other states or will send them to other states to obtain relief in the form of punitive damages.¹⁴⁸ Moreover, the one punitive damage award that is available under Ohio law is enjoyed entirely by the initial plaintiff or plaintiffs. Not only will this create a rather "unseemly race to the courthouse," but also it will promote serious inequities between the initial plaintiff and all subsequent plaintiffs.¹⁴⁹ Moreover, the fact that a plaintiff possesses no legal "right" to a punitive damage award does little to mitigate the anger that a subsequent plaintiff might feel at such disparate treatment.¹⁵⁰

IV. TOWARD A PROCEDURAL SOLUTION

The ideal means of protecting tortfeasors from incurring multiple and excessive punitive damage awards involves the creation of a federal class action procedure, in which a defendant would be liable for a single award of punitive damages to be split between all injured plaintiffs.¹⁵¹ Of course,

¹⁴⁵ *Froud v. Celotex Corp.*, 437 N.E.2d 910, 913 (Ill. App. Ct. 1982) (concluding that a common law cause of action for punitive damages survives the injured parties' demise), *rev'd*, 456 N.E.2d 131 (Ill. 1983).

¹⁴⁶ See *supra* note 29 and accompanying text.

¹⁴⁷ See *supra* note 63 and accompanying text.

¹⁴⁸ See *supra* Part III.A.

¹⁴⁹ *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45 (E.D. Ky. 1977); see also, e.g., Seltzer, *supra* note 37, at 56 (commenting on the competitive race to the courthouse that would unfairly benefit the first to win the race and addressing the ethical problems that might be created for attorneys trying to decide which case to pursue first).

¹⁵⁰ See Leishman, *supra* note 40, at 446 nn.41-42.

¹⁵¹ This idea has been suggested in one form or another as far back as the 1930s. See Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1195 (1931)

the Ohio General Assembly is without the power to enact such a procedure. Thus, in the absence of federal congressional action, the best solutions available to the Ohio General Assembly are to allow for additional procedural safeguards and to trust the discretionary capabilities

(implying that courts should consider joinder of claims or apprise the juries of the other action in situations involving two or more possible punitive damage awards). Because a federal class action offers little practical assistance for solving the problems in Ohio, this Comment offers only a general overview to illustrate that national reform is the most effective means of solving this problem without dismantling the goals of tort law. For a detailed examination of the workings of such a class action, see Jones et al., *supra* note 37; Leishman, *supra* note 40; Phillips, *supra* note 37; Seltzer, *supra* note 37; Note, *Class Actions for Punitive Damages*, 81 MICH. L. REV. 1787 (1983).

Rule 23(a) of the Federal Rules of Civil Procedure allows for the creation of a class upon judicial determination that the requirements of "numerosity," "commonality," "typicality," and "adequacy of representation" are satisfied. FED. R. CIV. P. 23(a). If these requirements are met, a judge must decide which of three class actions specified in Rule 23(b) is the most appropriate means of adjudicating a particular controversy. See FED. R. CIV. P. 23(b). Of these three types of class actions, only one would prove useful in protecting tortfeasors from multiple awards of punitive damages. A 23(b)(3) class action would be ineffectual because the "opt-out" provision would defeat the central purpose for which the class was certified: protecting mass tortfeasors against multiple punitive damage suits. See *id.* A 23(b)(2) class action would also be inappropriate because it applies to actions in which plaintiffs seek injunctive or declaratory remedies. See *id.* Given that the very nature of punitive damages is derived from the imposition of a monetary fine, a financial remedy is indispensable. Rule 23(b)(1) would, however, provide a suitable means of certifying a class under a "limited fund" theory. See FED. R. CIV. P. 23(b)(1) advisory committee's comments.

The limited fund theory is an extension of Rule 23(b)(1)(B), which allows for the creation of a class when there is a risk of "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication." FED. R. CIV. P. 23(b)(1)(B). Mass tortfeasors facing numerous lawsuits for a course of conduct might have insufficient funds to satisfy all claims against them, creating a situation in which the interests of subsequent plaintiffs would be put at risk by the recovery of damage awards by initial plaintiffs. In such situations, a court can certify a mandatory 23(b)(1)(B) limited fund class. See FED. R. CIV. P. 23(b)(1)(B). Thus, a single punitive damage award, to be split among the members of the class, could be assessed after compensatory damages were paid to all plaintiffs. The advantages of such a class action would be numerous: punitive damages would be awarded only after all plaintiffs have received compensatory damages; all plaintiffs would have equal opportunity to collect punitive damages; judges could insure that the aggregate amount of punitive liability was adequate in light of a defendant's financial status after compensatory damages were awarded; greater judicial efficiency would be accomplished by preventing repeated trials for a single course of conduct; juries could more accurately determine the appropriate amount of damages necessary to punish and deter a tortfeasor based on the total harm caused; law enforcement would be encouraged; and attorney fees would be defrayed.

of the judge and jury.

Fears of excessive and multiple awards of punitive damages can be assuaged by considering the possible means of controlling their imposition upon a mass tortfeasor. A variety of safeguards could be implemented throughout the trial, and if necessary, appellate review. While the following examples are certainly not comprehensive, they do illustrate several simple means of dealing with the problems of multiple and excessive punishment for a single course of conduct.

First, the General Assembly could make the "clear and convincing" standard applicable to the burdens of admissibility, production, and proof for all cases in which plaintiffs pursue subsequent awards of punitive damages.¹⁵² This safeguard would, of course, necessitate a bifurcated trial so as to avoid interfering with the plaintiff's compensatory damage claims.¹⁵³ The "clear and convincing" standard would help reduce the number of frivolous claims for subsequent punitive damages, the number of cases seeking subsequent punitive damages that would proceed to trial, and the number of subsequent punitive damages actually awarded. However, punitive damages would remain an available remedy in situations in which plaintiffs could produce substantial evidence of outrageous behavior.

Second, the General Assembly could establish that any refusal by the jury to award punitive damages was not reviewable by the judiciary.¹⁵⁴ This safeguard should concomitantly establish that whatever amount a jury does award could never be judicially determined to be unreasonably low.¹⁵⁵ This should reduce both the number and the amount of subsequent punitive damage awards.

Third, the General Assembly should set a target amount of maximum punitive liability to which a defendant may be subject. This amount should be a percentage of a defendant's total net worth after projected compensatory damage awards are subtracted.¹⁵⁶ This approach would allow the necessary flexibility for fashioning meaningful punitive damage awards that adequately

¹⁵² Currently this standard is used only when one of the two exceptions to the one-bite provision is applicable. *See* OHIO REV. CODE ANN. § 2315.21(D)(3)(b)(i)-(ii) (Anderson Supp. 1996); *see also supra* Part III.A-B.

¹⁵³ The current system of bifurcation used for trials involving punitive damages would suffice. *See* OHIO REV. CODE ANN. § 2315.21(B)(1) (Anderson Supp. 1996).

¹⁵⁴ *See id.*

¹⁵⁵ *See id.*

¹⁵⁶ *See, e.g.,* Owen, *supra* note 9, at 1319 (suggesting that "the total punishment the enterprise will probably receive from other sources" should be considered when calculating punitive damage awards).

punish and deter mass tortfeasors.¹⁵⁷ The jury should be instructed to work within the allotted percentage amount, but would be free to exceed the percentage under exceptional circumstances.

Fourth, requiring the jury to consider evidence of past and potential awards of punitive damages to which the defendant might be subject would allow a mass tortfeasor to present evidence to convince a jury that the tortfeasor has received enough punishment for a single course of conduct.¹⁵⁸ Similarly, the jury could assess whether the tortfeasor has been sufficiently deterred by examining evidence of the tortfeasor's behavior since the imposition of previous punitive liability.¹⁵⁹

Fifth, the General Assembly should explicitly encourage greater judicial review of excessive punitive damage awards. This review would not be idle because judges possess the power of remittitur, which allows them to reduce unreasonably high damage awards.¹⁶⁰ The General Assembly could state its intention that judges apply stricter scrutiny to cases involving mass tortfeasors and could suggest greater use of this power when the dangers of excessive and multiple punitive damage awards arise.

Finally, appellate courts could be given the power to review subsequent punitive damage awards *de novo*. This would allow appellate courts greater flexibility to overrule or reduce excessive punitive damage awards allowed by lower courts.

Admittedly, these safeguards are an imperfect solution to a problem that is best solved at the federal level.¹⁶¹ However, a defendant is not entitled to a perfect trial, only a fair one.¹⁶² Thus, the aforementioned procedural safeguards offer a much more equitable means of balancing the competing interests of business and the goals of tort law. While this solution will not eliminate all excessive or multiple awards of punitive damages, it should significantly reduce

¹⁵⁷ See *supra* Part III.D.

¹⁵⁸ See *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 459–60 (Wis. 1980) (“The danger of excessive multiple punitive damage[] awards can be avoided in Wisconsin because the jury may consider the wealth of the defendant which would include consideration of compensatory and punitive damages and fines and forfeitures already imposed on the defendant or likely to be imposed on the defendant.”).

¹⁵⁹ See *Owen*, *supra* note 9, at 1316 (“If, for example, the defendant can [show] that it voluntarily terminated the misbehavior . . . the need for specific deterrence would be correspondingly diminished.”).

¹⁶⁰ See generally 5 HARPER & SOLOMINE, *supra* note 53, § 184:02 (explaining that Ohio courts have the power of remittitur allowing them to reduce excessive jury awards).

¹⁶¹ See *supra* note 151 and accompanying text.

¹⁶² See generally 17 OHIO JUR. 3D *Constitutional Law* §§ 644–47 (1980) (explaining the nature of due process rights under the Ohio and federal constitutions).

the number of defendants exposed to such liability.¹⁶³ Moreover, if excessive and multiple punitive damage awards are as rare as studies suggest,¹⁶⁴ the creation of additional safeguards will truly render them "more theoretical than real."¹⁶⁵ What liability a mass tortfeasor might incur will have been imposed only after numerous actors within the legal system have decided that punitive damages were warranted—a decision made within a system greatly favoring the defendant's interests. In the face of such protections, claims that multiple awards of punitive damages violate a mass tortfeasor's due process rights should garner little sympathy.

Most important, these safeguards respect the fundamental goals of tort law and punitive damages. That is, the ability of the people to control the behavior of civil wrongdoers through punishment and deterrence is restored, while the tangential goals of encouraging law enforcement and compensation are satisfied.¹⁶⁶ This is achieved, in part, by trusting the discretionary abilities of the judge and jury. Moreover, this solution recognizes that only through case-by-case analysis can these goals be accomplished and the interests of justice be met. These safeguards would also restore to Ohio remedies available in most other states, thus eliminating any advantage citizens of other states might have over Ohio citizens with respect to collecting remedies for tortious injury.¹⁶⁷ In this manner, a more logical and equitable policy would be promoted. Finally, because these safeguards treat all similarly situated plaintiffs equally, constitutional violations would be of no concern.¹⁶⁸

V. CONCLUSION

To the victor goes the spoils. Business interest groups have won the battle over tort reform in Ohio. However, the war is far from over. Undoubtedly, the Ohio Tort Reform Act will be challenged on constitutional grounds in the near future. While the result of such a challenge is uncertain, it is clear that the political climate in Ohio will play an important role in the future of punitive damages. Thus, until popular myths are dispelled, punitive damages will continue to be widely opposed, despite the fact that the remedy is by the people and for the people. In the interim, the Ohio Supreme Court may be the last line of defense in the war over tort reform.

¹⁶³ While these safeguards will do nothing to prevent a mass tortfeasor from exposure to multiple awards of punitive damages under the law of other states, that problem is best solved by those states or the federal government, not the Ohio General Assembly.

¹⁶⁴ See *supra* note 140 and accompanying text.

¹⁶⁵ Owen, *supra* note 9, at 1325.

¹⁶⁶ See *supra* Part II.

¹⁶⁷ See *supra* notes 62–66 and accompanying text.

¹⁶⁸ See *supra* Part III.C.